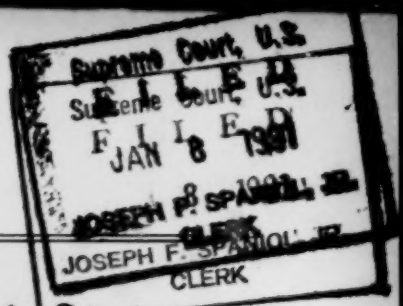


(2)

No. 90-899

In The

# Supreme Court of the United States

October Term, 1990

THE COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH INCORPORATED, J. SINCLAIR ARMSTRONG, ROBERT E. MORRIS, JR., DORIS CAPP STASS, GEORGE H. WEILER, III, MADELEINE CALDER, BEATRICE LOTZ, BROMWELL AULT, JR., NEAL GOLDMAN and CHARLOTTE PIERCE ARMSTRONG,

*Petitioners,*

against

THE RECTOR, WARDENS and MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH, and THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 9, 1991

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## Question Presented

Whether the court of appeals erred in holding that the district court's denial of motion to intervene, pursuant to Federal Rule of Civil Procedure 24(b), was not an abuse of discretion where the purported intervenors sought to require a trial *de novo* that the parties had stipulated was unnecessary.

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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This brief is submitted by respondents, The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or "the Church") in opposition to the certiorari petition of the Committee To Oppose The Sale of St. Bartholomew's Church, Inc. ("the Committee") and certain members of the Committee.[1]

## COUNTER STATEMENT OF THE CASE

Petitioners' "case" does not involve questions concerning free exercise of religion, taking of property without compensation, or whether factual determinations in an underlying litigation can only be made on an administrative record without conducting a trial *de novo*.[2] The only issue properly raised in their certiorari petition is the denial of a motion for permissive intervention under F.R.C.P. Rule 24(b).[3]

Contrary to the representations in the petition, petitioners did not — because they are not parties to the litigation and therefore could not — appeal from the district court's decision not to have a trial *de novo*. Neither party appealed that ruling to the court of appeals. Therefore, the court of appeals could not and did not address this issue. The only issue raised

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1. St. Bartholomew's is incorporated under the New York Not For Profit Corporations Law as a Religious Corporation. St. Bartholomew's does not have any parent or subsidiary company.

2. Petitioners sought to intervene in an action entitled *The Rector Wardens And Members Of The Vestry Of St. Bartholomew's Church v. The City of New York And The Landmarks Preservation Commission Of The City Of New York*, 728 F. Supp. 958 (S.D.N.Y.), *aff'd*, 914 F.2d 348 (2d Cir. 1990). The Church filed a petition for a writ of certiorari in that matter, Supreme Court Index No. 90–900, on December 10, 1990.

3. Petitioners also sought to intervene as of right under F.R.C.P. Rule 24(a)(2). The court of appeals held that the district court did not abuse its discretion in denying that motion "because the proposed intervenors lack any legally protectable interest in this matter." (27a). Petitioners do not seek certiorari with respect to that ruling.

by petitioners' appeal to the court of appeals was the denial of their motion to intervene.

## REASONS FOR DENYING THE PETITION

Petitioners fail to show any reason why the Court should exercise its discretion to grant their petition for certiorari. Petitioners point to no conflict between the circuits, no unsettled question of federal law, and no error in law as to the denial of their intervention motion — indeed, they point to nothing other than an exercise of discretion by the district court which is amply supported by the record and was correctly affirmed by the court of appeals. There is no showing that the denial of petitioners' intervention motion was wrong, let alone any showing of special and important reasons why their certiorari petition should be granted.

## DISCUSSION

In affirming the district court's denial of petitioners' motion for permissive intervention, the court of appeals concluded that not only was there no abuse of discretion in denying the motion, but that:

> It was eminently reasonable to conclude that intervention only would complicate the litigation, and thereby "unduly delay... the adjudication of the rights of the original parties." Fed. R. Civl. P. 24(b). (28a).

The record below is clear that denial of petitioners' motion for permissive intervention was not only a proper act of discretion, but was mandated by any reasonable reading of the Federal Rules of Civil Procedure. Rule 24(b) requires a court in exercising its discretion to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *See, e.g., Securities and Exchange Commission v. Everest Management Corp.*, 475 F.2d 1236, 1239–40 (2d Cir. 1972) (permissive intervention denied where "the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues").

Petitioners' presence as intervenors would have resulted in substantial delay and prejudice to the existing parties.[4] The parties agreed, and the court below ordered, that this case should be decided on the administrative record before the Landmarks Preservation Commission without the testimony of live witnesses. Petitioners complain that they should have been allowed to intervene as parties in order to require a complex and prolonged trial that plaintiff and defendants had agreed was unnecessary (and that the district court had ruled, as a matter of law, to be inappropriate). It is difficult to imagine anything more prejudicial to the rights of the original parties.

As it was, the litigation before the district court lasted over three and one–half years, much of which was taken up with consideration of petitioners' repeated motions to intervene. During that period, on July 27, 1988, the district court determined as a matter of law that a trial with live witnesses would be inappropriate. (7/27/88 Tr. at 22, 32). On the basis of that ruling, the parties — and the petitioners — briefed the administrative record. The district court ultimately rendered its decision on December 13, 1989, reaffirming its earlier ruling that, based on "principles of comity and federalism," its decision should be made on the administrative record. (12b). That ruling was not appealed by either party.[5]

Indeed, as the district court pointed out, the parties themselves had "requested and consented to" a trial on the administrative record. (12b). The district court denied permissive intervention on the grounds that, *inter alia*, "intervention would have seriously interfered with the parties' desire to

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4. Petitioners are a group of dissident parishioners who, joined by others from outside the Church, have opposed the Church's proposed development. They opposed each of the Church's applications before the Commission and have engaged the Church, its Rector and the members of its Vestry in extensive and costly litigation in state courts.

5. Although the district court declined to conduct a trial *de novo*, the court nonetheless conducted a *de novo* review of the evidence contained in the administrative record before the Landmarks Commission. (12b–14b).

expeditiously resolve the constitutional claims raised on the administrative record, and might well have led to collateralization of the issues and further discovery." (7b). Petitioners have cited no case — and we are aware of none — in which intervention was permitted for the purpose of radically transforming the procedural framework of litigation agreed to by the parties and found by the district court to be legally required.[6]

Finally, while the Church agrees that the Landmarks Law fails to provide anything resembling an orderly procedure for the resolution of factual issues, it was the Church — not petitioners — that was disadvantaged. Both petitioners and the Landmarks Preservation Commission had ample opportunity to submit testimony and reports disputing the evidence submitted on behalf of the Church. The Church, however, was denied any opportunity to rebut adverse submissions by the Commission's staff and the Commission's own witnesses. (A. 407–48, 764–69).[7] Similarly, witnesses appearing on behalf of the Church were subjected to vigorous cross-examination by the members of the Commission, while the testimony of opposing witnesses was, without exception, received uncritically.[8] (*Compare* 4/1295–1336, 1341–94 *with* 3/843–76, 907–27).

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6. Petitioners' rely principally on *Crowell v. Benson*, 285 U.S. 22 (1932), in support of their argument that a trial *de novo* was required. The continuing vitality of *Crowell v. Benson* is uncertain (*See, e.g.*, Davis, *Administrative Law Treatise*, §29:23 (1984)), but it has never been applied to provide a trial *de novo* at the insistance of a party seeking to *uphold* an administrative determination. Moreover, it has nothing to do with denial of intervention — the only issue which petitioners can properly raise.

7. The appendix in the court of appeals is cited as "(A. ___)." The appendix in the district court is cited by volume/page; for example, 10/3271 refers to volume 10, page 3271 of the district court appendix.

8. Given those facts, it was the Church that stood to benefit most from a trial *de novo* before the district court. Nevertheless, having incurred the cost, in time and money, of three separate proceedings before the Landmarks Commission, the Church sought to conserve its diminishing resources by agreeing to a determination by the district court on the basis of the administrative record.

The facts of this case provide no basis for a determination that the denial of intervention by the district court constituted an abuse of discretion or that the court of appeals erred in affirming the district court. On the contrary, they make it clear that the *grant* of petitioners' motion would have been an abuse of discretion.

## CONCLUSION

The petition at bar raises no question of either law or policy that warrants certiorari by this Court. What is more, there is no legal basis for intervention. The motion to intervene was properly denied by the district court, and its denial was correctly affirmed. Accordingly, petitioner respectfully prays that the Court deny the petition for a writ of certiorari to review that part of the judgment of the Court of Appeals for the Second Circuit which affirmed the denial of petitioners' motion to intervene.

Dated: January 9, 1991

Respectfully submitted,


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